

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

★ ★ ★ ★ ★

In the Matter of:

REPUBLIC CORPORATION, d/b/a)	
KENTUCKY ELECTRIC STEEL COMPANY)	
)	
VS.)	CASE NO. 9374
)	
KENTUCKY POWER COMPANY)	

O R D E R

On June 27, 1985, Republic Corporation, d/b/a Kentucky Electric Steel Company ("Kentucky Steel") filed a complaint against Kentucky Power Company ("Kentucky Power") requesting relief from the terms of the Commercial/Industrial Power Time-of-Day tariff ("CIP-TOD") under which it has received electric service since November, 1983. The complainant alleges that 1) since April 26, 1985, its electric consumption has significantly decreased due to a labor strike and consequently it no longer qualifies for the CIP-TOD tariff but should be billed under Kentucky Power's Temporary Service ("TS") tariff; 2) its power bill for May, 1985, as calculated by Kentucky Power under the CIP-TOD tariff, was \$207,500, whereas its bill if calculated under the TS tariff would be only \$24,400; 3) it should not be held liable for the monthly minimum billings provided for in the CIP-TOD tariff because its service contract with Kentucky Power expired

on November 28, 1984; and 4) imposition of the CIP-TOD tariff would cause undue harm sufficient to justify the Commission's granting of relief therefrom.

The subject matter of the complaint, the CIP-TOD tariffs, has its origin in Case No. 8871, "Time of Day Tariff Filing by Kentucky Power Company." By Order entered October 28, 1983, in that proceeding, Kentucky Power was directed to implement mandatory time of day rates on a one-year experimental basis for all commercial and industrial customers whose demand exceeds 7,500 kilowatts. Pursuant to this directive, Kentucky Steel and Kentucky Power entered into a one-year service contract, dated November 28, 1983, which superseded their existing service contract. The new contract provided Kentucky Steel with a reservation of capacity of 35,000 kilowatts and an obligation to pay for electric energy at the rate set forth in Kentucky Power's CIP-TOD tariff. On September 25, 1984, the Commission issued a further Order in Case No. 8871 directing that the experimental CIP-TOD tariffs be extended until such time as Kentucky Power has performed a cost-benefit analysis of the CIP-TOD rates, a written report is submitted to the Commission, and a final disposition of the experimental nature of the tariff is made. That Order also stated that relief from the CIP-TOD rates would be considered for any customer unduly harmed by their extension.

On July 12, 1985, Kentucky Power filed an answer alleging that the parties' one-year service contract dated November 28, 1983, was extended and remains in effect as a result of 1) the Commission's extension of the CIP-TOD tariffs; 2) the parties'

mutual consent and their course of conduct; and 3) the CIP-TOD tariff itself. Kentucky Power also filed a motion to dismiss and a statement in support thereof. On July 16, 1985, Kentucky Steel filed a response in opposition to Kentucky Power's motion to dismiss and the case was submitted for adjudication upon the parties' agreed stipulation, filed August 9, 1985, waiving any right to an evidentiary hearing and requesting the Commission to decide the case on the basis of the record.

Kentucky Power's statement in support of dismissal notes that Kentucky Steel has been served for over two decades under a contract with a minimum monthly service demand charge. Prior to the expiration of their one-year service contract embodying the CIP-TOD tariffs, Kentucky Power notified Kentucky Steel that the Commission had directed an extension of the CIP-TOD rates beyond the initial one-year term and that Kentucky Steel would continue to be billed under the terms of their CIP-TOD contract.¹ That notice also advised Kentucky Steel that if it anticipated any harm due to the extension of the CIP-TOD tariff, written comments should be addressed to the Commission. No such comments were filed and Kentucky Steel continued to be billed and pay for power through April 1985 under the CIP-TOD tariff.

Kentucky Power argues that Kentucky Steel's continued payment for power at CIP-TOD rates subsequent to November 28, 1984, evidences its acceptance of the Commission's Order entered

¹ Kentucky Power letter to Kentucky Steel dated October 3, 1984, attached to Kentucky Power's Statement as Appendix B.

September 25, 1984, in Case No. 8871 extending the CIP-TOD tariffs until the conclusion of that case. Kentucky Power alleges that any harm incurred by Kentucky Steel is a result of its labor strike, not the CIP-TOD tariffs; and that if it is able to evade its monthly minimum billing due to its reduced consumption, such minimums will be rendered meaningless.

Kentucky Power further argued that Kentucky Steel does not qualify for service under the TS tariff since service thereunder is expressly limited to customers not permanently located. The TS tariff contains no rates but merely refers to what would be the applicable rate for a permanent customer. If the TS tariff were applied to Kentucky Steel, the applicable rate would be from the QP (Quantity Power) tariff, which contains a minimum billing provision similar to that in Kentucky Steel's CIP-TOD contract.

In its response to the motion to dismiss, Kentucky Steel argues that while the Commission has the power to extend the tariffs governing a service contract, it lacks the authority to unilaterally extend a contract to which it is not a party. Kentucky Steel further argues that the facts of this case do not support the finding of an implied contract because an implied contract is intended to prevent unjust enrichment, whereas here it would unjustly enrich Kentucky Power by the minimum bill provision.

Based on the evidence of record and being advised, the Commission is of the opinion and hereby finds that Kentucky Steel's continued receipt of power subsequent to November 28, 1984, and its payment therefor under the CIP-TOD tariff, clearly

indicates its acceptance of the extension of the CIP-TOD tariff and the capacity reservation and minimum billing provision of its CIP-TOD service contract. Since Kentucky Steel's own actions form the basis upon which its service contract was extended, there is no need to determine whether the Commission has the authority to unilaterally extend a customer's service contract.

The Commission further finds that extension of Kentucky Steel's service contract does not result in unjust enrichment through the payment of monthly minimum bills. The minimum bills are designed to compensate Kentucky Power for its obligation to at all times be ready to supply the capacity reserved by Kentucky Steel. In return for its minimum payments, Kentucky Steel is assured the availability of electric power up to the limits of its capacity reservation.

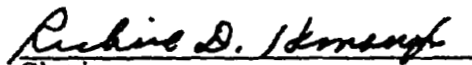
The Commission further finds that Kentucky Steel has failed to present sufficient evidence to justify relief under the undue harm provision set forth in the Commission's Order entered September 25, 1984, in Case No. 8871. That Order recognized the need to grant relief from the CIP-TOD tariffs if the customer would be unduly harmed by their extension. Here the harm complained of is Kentucky Steel's labor strike, not the tariff extension. If the CIP-TOD tariff had not been extended, Kentucky Steel would be served under the QP tariff which has a monthly minimum billing provision as does the CIP-TOD tariff.

IT IS THEREFORE ORDERED that Kentucky Steel's complaint be and it hereby is dismissed and the relief requested therein be and it hereby is denied.

IT IS FURTHER ORDERED that Kentucky Power shall continue to bill Kentucky Steel pursuant to the terms of the CIP-TOD tariff.

Done at Frankfort, Kentucky, this 13th day of September, 1985.

PUBLIC SERVICE COMMISSION


Chairman


Vice Chairman


Commissioner

ATTEST:

Secretary